IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 87 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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G S NANJEE & SONS - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :

MR RK PATEL for Applicant(s) : 1,

MR BB NAIK for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 18/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. The Income-Tax Appellate Tribunal, Ahmedabad Bench-”A” has referred the following question under Section 256(1) of the Income-Tax Act, 1961 (The Act), at the instance of the assessee.

> “Whether, on the facts and circumstances of the case and in law, the Tribunal was justified in confirming the penalty of Rs.30,000/- levied u/s 271(1)(c) of the Income-Tax Act, 1961?”

2. The Assessment Year is 1982-83 for which the relevant accounting period is calender year 1981. The assessee is a firm, carrying on the business of dealing in machinery spares, tools, etc. For the year under consideration, the assessee had returned total income of Rs.42,620/-, which was assessed at Rs.80,670/- under section 143(3) of the Act. The additions, interalia included addition of Rs.44,106/-

towards suppression of sales. Accordingly, penalty proceedings under section 271(1)(c) of the Act were initiated by the Assessing officer by issuing notice under section 274 of the Act. After considering the explanation of the assessee, the Assessing Officer held that the assessee had concealed the particulars of income and, accordingly, levied penalty of Rs.30,000/- under section 271(1)(c) of the Act. The assessee carried the matter in appeal before the Commissioner of Income-Tax (Appeals). The Commissioner of Income-Tax (Appeals) observed that the assessee had not disputed the recovery of loose papers from its business premises and which contained entries relating to suppressed sales. Accordingly, the penalty was confirmed. The assessee did not succeed in further appeal before the Income-Tax Appellate Tribunal.

3. The basic facts are that during the course of search by the Sales-Tax Department on 27.04.1982, at the business premises of the assessee, certain slips and kachcha receipts were found and seized. Based on the notings on these loose papers, the Sales Tax

Department estimated the concealed sales at Rs.44,106/- for the year under consideration. Placing reliance upon these figures of the sales-tax authorities, the Assessing Officer called upon the assessee to show cause as to why the amount of concealed sales at Rs.44,106/- should not be added as suppressed sales. After considering the detailed written submissions submitted by the assessee, the Assessing Officer added the amount of Rs.44,106/- towards suppressed sales to the total income of the assessee and framed assessment order with a direction that proceedings under Section 271(1)(c) of the Act be initiated. The addition of Rs.44,106/- made in the assessment order was sustained in first appeal by the Commissioner of Income-Tax (Appeals). In further appeal before the Income-Tax Appellate Tribunal, the order of Commissioner of Income-Tax (Appeals) was upheld.

4. In penalty proceedings before the Assessing Officer, the assessee took the stand that the addition was made only on the strength of the action of the Sales tax authorities and that the Assessing

Officer did not find any defects or mistakes in the regular books of account. It was further argued that the notings and entries in the loose papers were not a conclusive proof of sales outside the books of account and that penalty for concealment of income cannot be imposed merely on the basis of presumption. The Assessing Officer was not satisfied with this explanation. He held that in both, Sales-tax assessment proceedings and Income-tax proceedings, the suppression of sales had been upheld, and that the same was duly supported by the assessee's own records seized during the search. He, therefore, vide his order dated 23.03.1987, held the assessee liable for imposition of penalty and accordingly passed order under section 271(1)(c) of the Act imposing penalty of Rs.30,000/-.

5. The aforesaid order of penalty under Section 271(1)(c) of the Act was upheld by the Commissioner of Income-Tax vide his order dated 04.09.1989. In further appeal, the Tribunal confirmed the order of the Commissioner of Income-Tax vide its order dated 15.06.1994.

6. Heard Mr.R.K.Patel, learned advocate for the applicant-assessee and Mr.B.B.Naik, learned standing counsel for the respondent-Tribunal.

7. Mr.R.K.Patel assailed the order of Tribunal contending that the penalty had been levied solely on the basis of the order passed in quantum proceedings. It was submitted that the penalty proceedings cannot be placed at par with assessment proceedings and that penalty cannot be imposed under Section 271(1)(c) of the Act solely on the basis of the reasons given in the original assessment order. In support of this contention, reliance was placed upon the decision of Apex Court in the case of Commissioner of Income-Tax, Madras V/s. Khoday Eswarsa & Sons (1972) 83 ITR 369. It was submitted that the estimated figure of sales of Rs.44,106/- is a mere guess work. It was submitted that the book results have been accepted and Section 145 of the Act has not been invoked at assessment stage.

8. Referring to the provisions of Section 145 of

the Act, it was submitted that it was only in case where the Income-Tax Officer was not satisfied with the correctness or completeness of the accounts of the assessee that resort could be made to the provisions of Section 144 of the Act by making best judgment assessment. That, in the facts of the present case, as the book results had been accepted, no best judgment assessment had been made. It was urged that as the provisions of Section 145(2) of the Act had not been invoked, the Assessing Officer was not justified in making the addition, much less levying penalty.

9. It was submitted that the addition correlatable to penalty imposed is based on estimate which is taken as suppressed sales, and the Assessing Officer had not conclusively proved that the addition was the income of the assessee.

10. It was submitted that in quantum proceedings addition had been made on the basis of estimation made by the Sales-tax Officer. That no independent finding had been recorded to point out any suppressed

sales. The material facts referred to by the Assessing Officer in the order of assessment, which formed the basis for the addition, was the order of Sales-tax Officer, which in turn was based on estimate. It was submitted that estimation is permissible while framing the assessment order, but the order of penalty cannot be based on estimate. That, the Assessing Officer had erroneously proceeded on the footing that once addition is made, penalty is inevitable under the provisions of Section 271(1)(c) of the Act. It was contended that reliance placed by the Tribunal on the decision of the Apex Court in case of Commissioner of Sales Tax, Madhya Pradesh v. H.M.Esufali H.M.Abdulali (1973) 90 ITR 271 was misplaced, as the said decision would not apply to penal provisions under Section 271(1)(c) of the Act, in light of the fact that the scheme under the Sales-Tax Act and the Income-Tax Act are totally different. Referring to the operative part of the aforesaid decision of the Apex Court, it was pointed out that in the said case the estimate of taxable turnover was held to be legal and justified and that as a consequence, the penalty imposed on the assessee was

held to be in accordance with law. It was pointed out that under the Income-Tax Act penalty cannot be imposed as a consequence of an addition made in the assessment order. Reliance was placed upon the decision of this Court in the case of Commissioner of Income-Tax V. Parmanand M. Patel (2005) 278 ITR 3 to contend that the scheme of the Sales Tax Act and the Income Tax Act, are different in content and legislative intent, hence, the Assessing Officer was not justified in imposing penalty on the basis of the reasons given in the original assessment order, which in turn was based upon the estimation of concealed sales made by the Sales Tax authorities in proceedings under the Sales Tax Act.

11. The learned counsel further submitted that penalty cannot be imposed if the facts and circumstances of the case are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. That, if the assessee's explanation is unproved, but not disproved, penalty cannot be levied in absence of any material to indicate that the amount in question

was income of the assessee. Reliance was placed upon the decision of this Court in the case of National Textiles V/s. Commissioner of Income-Tax (2001) 249 ITR 125 as well as in the case of Dahod Sahakari Kharid Vechan Sangh Ltd. v. Commissioner of Income-tax, (2005) 149 Taxman 456 in support of the aforesaid contention.

12. Reliance was also placed upon the decision of this Court in the case of Navjivan Oil Mills v. Commissioner of Income-Tax (2001) 252 ITR 417, to contend that the presumption against the assessee under the Explanation to section 271(1)(c) was a rebuttable one, and that the onus could be discharged by the assessee on the basis of preponderance of probabilities. It was submitted that accordingly, the assessee had duly discharged the onus which lay on it and rebutted the presumption under the explanation to section 271(1)(C) of the Act. The decision in the case of Commissioner of Income-tax v. President Industries, (2002) 258 ITR 654 was relied upon for the proposition that for levy of penalty, the amount of gross sales by itself cannot constitute

income of the assessee since there is no material to indicate that the investments are made outside the books of accounts. That at the most, only the realization of excess over the cost incurred can be part of profit embedded in the sales.

13. It was further contended that in quantum proceedings, the Tribunal while confirming the addition of Rs.44,106/- towards undisclosed sales has not indicted the assesee for suppression of sales as in the first paragraph of its order, the Tribunal has observed that the action of the Income tax authorities is being upheld only on the ground that the Bench was not in a position to accept the assessee's explanation that the rough book seized by the Sales-tax department was used for various purposes and not necessarily only for the sale effected by it. In the circumstances, it was submitted that the Tribunal was not justified in confirming the levy of penalty under section 271(1)(c) of the Act.

14. Mr.B.B.Naik, the learned standing counsel

appearing on behalf of the respondent-revenue, submitted that the raid by Sales tax authorities took place on 27.04.1982. The return of income was filed on 11.07.1982. However, the amount treated as suppressed sales was not shown in the said return. Referring to Paragraph No.7 of the original assessment order, it was pointed out that the assessee's income was derived from dealing in machinery spare parts and tools and the unrecorded sales detected by the Sales-tax department has a direct bearing on the income-tax assessment. It was submitted that the assessee by resorting to purchases and sales outside the books had kept out of the books the investment in the purchases and the profits earned thereon, which amounts to concealment of its income. That the sales-tax department had recovered kachcha bills and the sales recorded therein were not reflected in the regular books of accounts. The Assessing Officer found that in the circumstances, the Sales-tax authorities were justified in estimating the sales in respect of kachcha bills that were not produced. The assessee had not been able to rebut the case made out against it, hence the

Assessing Officer was justified in coming to the conclusion that the undisclosed sales represented the assessee's unrecorded investments plus profits thereon, being its concealed income, and making addition of Rs.44,106/- to the assessee's total income. Mr. Naik also referred to the findings recorded in Paragraph Nos.4 and 5 of the order of the C.I.T. (Appeals). It was pointed out that the Assessing Officer had after making proper inquiries, as regards the findings recorded by the Sales-tax Officer, arrived at an independent finding that the assessee had suppressed the sales which represented the assessee's income. That independent findings had been given by the Assessing Officer that the assessee had resorted to making sales outside the books. The Commissioner (Appeals) found that no evidence had been produced before the Assessing Officer at the time of assessment proceedings as well as at the time of penalty proceedings to show that the rough book seized by the Sales-tax department was used for various purposes and not necessarily only for the purpose of recording the sales effected by the assessee.

15. Mr. Naik referred to the provisions of Section 271(1)(c) of the Act and more particularly to Explanation I thereof. It was pointed out that under the provisions of the said Explanation where in respect of any facts material to the computation of the total income of any person under the Act, such person offers an explanation, which he is not able to substantiate, then the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause-(c) of sub-section (1) of Section 271, be deemed to represent the income in respect of which particulars have been concealed. It was submitted that the assessee offered an explanation in respect of suppressed sales, but has not been able to substantiate the same in either of the two proceedings. It was submitted that, in the circumstances, no interference is called for at the hands of this Court. The learned counsel also referred to the decision of this Court in the case of Navjivan Oil Mills V/s. Commissioner of Income-Tax (Supra) and submitted that the penalty had been rightly imposed as there was concealment of

income.

16. Learned Advocate, Mr.R.K.Patel in rejoinder, submitted that as regards the contention raised on behalf of the revenue that sales had not been reflected in the books, the assessee had dealt with the same in its reply (pages 29 and 30 of the paper-book), wherein it was stated that if the material found by the Sales-tax department is used for estimating the income of the assessee for income-tax purpose, there must be some additional material, in conformity with the Income Tax Act. It was urged that such material can be found only in the books of accounts, as produced by the assessee before the Assessing Officer. That, in the present case, the book results had not been rejected and the provisions of section 145(2) had not been invoked. Hence, in absence of such material, the finding of the Sales Tax Officer for implementation of the provisions of the Sales Tax Act, during the course of sales tax proceedings is extraneous and irrelevant and cannot be used for the purpose of income tax assessment. Dealing with the contention as regards the

applicability of Explanation I of section 271(1)(c) of the Act, reliance was placed upon the decision of this Court in the case of National Textiles v. Commissioner of Income-tax (supra) to contend that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. Lastly it was submitted that even if the Explanation to section 271(1)(c) of the Act is invoked, the assessee had successfully discharged the onus which lay on it, by pointing out that the missing pages had been used for various other purposes.

17. The undisputed facts as available on record are that search was carried out by the Sales-tax authorities on 27.04.1982. During the course of search several loose slips in the form of kachcha bills were found by the Sales-tax authorities. It was found that the assessee had issued bills upto serial No.22 in relation to the year under consideration and that out of the same only 5 bills showing various amounts against various dates were

found. The assessee could not produce the missing bills, nor could it produce any evidence that the missing serial numbered bills were not kachcha bills, but something other than that. After considering the explanation tendered by the assessee, both the Sales-tax officer in Sales-tax proceedings as well as the Assessing Officer in quantum proceedings under the Income Tax Act, estimated the unaccounted sales at Rs.44,106/- as under:

Sales as per item No.9 of the inventory kachcha bills Nos.13 to 21	Rs.9,282.00
17 kachcha bills were not produced but sale proceeds estimated	Rs.34,824.00
	Rs.44,106.00

18. The Sales-tax officer adopted the figures of Rs.883/-, Rs.1,505/-, Rs.2,672/-, Rs.1,278/- and Rs.2,944/- mentioned in the case of 5 kachcha bills, being kachcha bill Nos.4,14,18,20 and 22 dated 15.09.1981, 25.11.1981, 04.12.1981, 17.12.1981 and 24.12.1981 respectively. The assessee was not in a

position to state the nature of the goods sold under the kachcha bills which were physically not recovered during the raid by the Sales-tax authorities. The Assessing Officer observed as follows:

> “In Para 7 of the A.A.C.'s order No.RJT/205/85-86 dated 16/07/1985, the learned A.A.C. has reproduced a copy of kachcha bill No.4 dt.15/09/1981 in English and the original bill is in Gujarati. According to the description of the bill dt.15/09/1981, the goods in question were sold to “M/s. Kissan Machinery Stores of Kalavad (Shitala) for Rs.882/-. In the said bill, the particulars of goods, quantity, price per piece, total value and labour charges etc. are mentioned. The narration of the kachcha bill also states that the goods in question have been sent through Patel Transport and the pending goods as per your order will be sent within a day or two.” In the appellate order, para-8,

> the learned A.A.C. further pointed out that the amount shown in kachcha bill for Rs.883/- was received by the assessee firm in cash. Similarly, by bill No.14, the assessee firm had sold two pumps for an amount of Rs.1,230/- and some other goods were also sold and the total payment of Rs.1,505/- was received in cash on 16/12/1981. It is, therefore, abundantly clear that the kachcha bills definitely show the unaccounted sales of the assessee which is not reflected in the books of accounts of the assessee firm."

19. As regards the missing bills, it was admitted on behalf of the assessee that the same could not be produced nor could any evidence be produced that the missing serial numbered bills were not kachcha bills but were used for some other purpose. It was submitted on behalf of the assessee that the remaining serial numbered bills were not sale bills, however, the same did not find favour with the

authorities as the assessee was not in a position to produce any direct or circumstantial evidence before any of the authorities in support of its submission, either at the time of assessment proceedings or at the time of penalty proceedings. The bills, though kachcha, were serially numbered, hence, the onus lay on the assessee to point out as to what had happened to the remaining sale bills. It is necessary to note that the estimate made by the Sales Tax Authorities has been accepted by the assessee and no explanation is available on record to show as to why the assesee did not dispute the addition in the Sales-tax proceedings.

20. It is in the light of the aforesaid factual matrix, that the contentions raised on behalf of the assessee are required to be tested.

21. It has been contended on behalf of the assessee that the penalty has been levied solely on the basis of the reasons given in the original assessment order in quantum proceedings, and that the estimated figure of sales of Rs.44,106/- is a mere guess work. From

the facts stated above, it is apparent that the assessee had issued kachcha bills in respect of certain part of its sales as is borne out by the five kachcha bills seized by the Sales tax authorities. It has been conclusively proved that the assessee was not accounting those bills in its regular books of accounts. The said record was sufficient to shift the burden of proof on the assessee, and it was for the assessee to disprove the evidence used by the Assessing Officer against it. However, the assessee has not produced any evidence in its favour to discharge the onus which lay on it. In the circumstances, no fault can be found with the authorities in concluding that the 17 missing bills also represented the unaccounted sales of the assessee. It is evident that the addition of Rs.44,106/- made by the Assessing Officer and confirmed by both the appellate authorities was based on material facts and the estimation of concealed sales was not a mere guess work. Nothing has been brought on record by the assessee to point out to the contrary.

22. It is in the aforesaid fact situation, that the Tribunal has found that the basis on which the suppressed sales had been worked out by the Sales-tax authorities and adopted by the Income-tax authorities was in conformity with decision of the Apex Court in the case of Commissioner of Sales Tax, Madhya Pradesh v. H.M.Esufali H.M.Abdulali, (1973) 90 ITR 271. In the facts of the said case, the assessee had dealings outside the accounts. It was held by the Apex Court that it was open to the officer to infer that the assessee has large-scale dealings outside the accounts. That, in such a situation, it was not possible for the officer to find out precisely the turnover suppressed and he could only make an estimate of the suppressed turnover on the basis of the material before him. So long as the estimate made by him was not arbitrary and had a reasonable nexus with the facts discovered, it could not be questioned. Adverting to the facts of the present case, the Tribunal upon appreciation of the evidence on record, has as a matter of fact found that there was a clear case of suppressed sales, which had resulted in concealment of income, and that

therefore, the levy of penalty was inevitable. In the circumstances, it cannot be said that the penalty has been levied solely on the basis of the reasons given in the assessment order.

23. It has also been contended that books of accounts and subsidiary records have been maintained and regular method of accounting has been followed. That the book results have been accepted and section 145 of the Act has not been invoked at the assessment stage. That resort to section 144 of the Act can be made only where the Assessing Officer is not satisfied as regards the correctness or completeness of the accounts of the assessee. That, book results had been accepted, hence, best judgment assessment could not have been made. As can be seen from the facts of the present case, all the authorities have concurrently found that the assessee has made sales outside the books of accounts. These suppressed sales are not reflected in the books. The Assessing Officer did not find that any particular entries in the books of accounts were not genuine. However, on the basis of the record seized by the Sales Tax

authorities, the Assessing Officer found that the assessee had omitted to enter particular items of sale in the books of accounts. The Assessing Officer found that both the investment in the purchases and the profit earned thereon had been kept out of the books; hence, this was a case of concealment of income. The Assessing Officer further found that the undisclosed sales recorded the assessee's unrecorded investment plus profit thereon, being its concealed income. Accordingly, he found that the income returned by the assessee was not the correct income. In the aforesaid circumstances, the Assessing Officer, without rejecting the book results as a whole has chosen to make addition in relation to the concealed sales. No fault can be found with the Assessing Officer in adopting such a course of action.

24. As regards the contention based upon the decision of this Court in the case of National Textiles v. Commissioner of Income-tax (supra) that penalty cannot be imposed as the facts and circumstances of the present case are equally

consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does, the same does not merit acceptance. The learned Counsel appearing on behalf of the assessee, on facts, was neither in a position to show that the kachcha bills did not represent the unaccounted sales made by the assessee, nor could he explain the nature of the missing kachcha bills, to point out that the same were used for any other purpose than sale bills. In the circumstances, it cannot be said that there was no material to indicate that the amount in question was the income of the assessee. In the present fact situation, the facts and circumstances are not equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. To the contrary, the facts and circumstances are consistent with only one hypothesis and that is that the amount in question represents the concealed income of the assessee.

25. In the circumstances, the Tribunal was justified in confirming the penalty of Rs.30,000/- levied under

Section 271(1)(c) of the Act. The reference is accordingly answered in the affirmative i.e. in favour of the assessee and against the revenue.

26. The reference stands disposed of accordingly with no order as to costs.

(D.A.MEHTA,J.)

(H.N.DEVANI,J.)

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